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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 388

MARSHALL P. SAFIR ET AL., *Petitioners*

v.

ANDREW GIBSON, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN PRESIDENT LINES, LTD.; PRUDENTIAL STEAMSHIP CO., INC.; PRUDENTIAL-GRACE LINES, INC.; AND FARRELL LINES, INC.

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OPINIONS BELOW

The opinions of the court of appeals and the district court, and the Report of the Federal Maritime Commission, are set forth in the Appendix to the Petition ("Pet. App."). The first opinion of the court of ap-

peals (Pet. App. 70a-79a) is reported at 417 F.2d 972; the court's two subsequent opinions (Pet. App. 7a-17a; and Pet. App. 1a-3a) are unreported. The district court's first opinion (Pet. App. 79a-85a) is reported 297 F. Supp. 630; its second opinion (Pet. App. 19a-21a) is unreported. The FMC's Report (Pet. App. 22a-65a) is reported at 11 F.M.C. 263.

QUESTION PRESENTED

After an investigation into "virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes" (Pet. App. 23a), the Federal Maritime Commission issued a report concluding that an approved shipping conference had violated Section 15 of the Shipping Act, 1916, by establishing certain illegal rates which were in effect for an eleven month period, but without any findings or conclusions as to the nature or extent of individual member carriers' participation in such action.

In the opinion of these respondents, the question is whether another agency, the Maritime Subsidy Board of the Maritime Administration, having responsibilities under a different statute with different underlying policies, is required, pursuant to Section 810 of the Merchant Marine Act of 1936, to terminate subsidies and to recover all past subsidies paid to all members of the conference during the period of violation without any investigation or opportunity for hearing as to the individual member carriers' participation in the violation and without opportunity for making a considered decision whether the underlying policies of the Merchant Marine Act warrant the imposition of such sanctions.

STATEMENT

Respondents are four subsidized United States-flag ocean carriers in liner service in various trades in United States foreign commerce. They have been referred to in this litigation as the "non-trade" lines because they did not serve the trade involved in this case, namely, that engaged in by petitioner, Sapphire Steamship Lines, Inc. At all times relevant to these proceedings, American President Lines has served only the trade between United States Atlantic and Pacific ports and ports in the Far East (Korea to Thailand), Indonesia, Malaysia and Singapore, West Coast of India and West Pakistan, and inbound from the Mediterranean; Farrell Lines has served only the trade between United States Atlantic and Great Lakes ports and ports in South and East Africa, West Africa and the Azores Islands, and between United States Gulf Coast ports and ports in Australia and New Zealand; Grace Line has served only the trade between ports in North and South America; and Prudential Lines has served only the trade between United States North Atlantic ports and ports in Portugal, Atlantic Spain south of Portugal, Bay of Gibraltar and Atlantic ports of Morocco, the Mediterranean Sea and other seas which are arms of the Mediterranean and Black Seas.[1]

Petitioner Sapphire Steamship Lines, Inc., was a nonsubsidized carrier which at all relevant times operated between United States ports and ports in the United Kingdom and Bordeaux-Hamburg range (Pet. App. 25a, 30a-31a).

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[1] Since the acquisition by Grace Line of Prudential Lines operating assets, Grace changed its name to "Prudential-Grace Lines, Inc." and continues to serve the trade routes formerly served by both Grace and by Prudential.

Together with 15 other United States-flag lines (not all of which are subsidized), serving these or other trades, respondents were members of the Atlantic and Gulf American-Flag Berth Operators ("AGAFBO"), an approved conference organized at the instigation of the Military Sea Transportation Service ("MSTS") to negotiate on behalf of AGAFBO members for the ocean movement of military cargoes.[2] As negotiations between AGAFBO and MSTS were concluded, rates for particular trade routes would be filed with the FMC. Although AGAFBO acted for the member lines in these negotiations, shipping contracts with MSTS would be executed by the individual lines serving those trades for which rates had been established. Thus, on occasion, AGAFBO would carry on negotiations with MSTS with respect to areas served by only one member line. (Pet. App. 27a-28a, 43a, 58a). To areas of the world not covered by such shipping contracts, military cargoes moved at commercial rates (Pet. App. 28a).

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[2] Approved FMC Agreement 8086, as amended, the charter under which AGAFBO functioned, permitted the member carriers to engage in concerted activities relating to transportation rates, and related matters, respecting military cargoes. AGAFBO was formed at the instigation and with the encouragement and approval of the military, because cooperative action was essential to efficient administration of the staggering administrative problems inherent in the ocean movement of vast quantites of military cargoes.

In general scope, the AGAFBO Agreement applied to military cargoes moving in all the foreign trades from the United States Atlantic, Gulf and Great Lakes ports [Paragraph 1], and participation was open to any U.S.-flag carrier operating in one or more of the many "trades covered by [the] Agreement." [Article 5] For purposes of administration, AGAFBO was in turn subdivided into the individual trades or regions served, and by the terms of Article 2(a) of the Agreement, as amended and approved July 10, 1962, "only those parties having a shipping contract or rate agreement with MSTS covering" a specific trade or region were entitled to vote or make decisions relating to that region.

The investigation made by the Maritime Commission in Docket No. 65-13 was into "virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes" (Pet. App. 23a). However, the only "AGAFBO rates" which the Commission concluded in its Report were in violation of Section 18(b)(5) of the Shipping Act were the rates applicable to movement of cargo between the United States and ports in the Bordeaux-Hamburg and the United Kingdom range which were put into effect to meet the rates of Sapphire Steamship Lines, "as a strictly temporary competitive measure," between March 29, 1965 and March 1, 1966 (Pet. App. 30a-31a, 34a-35a, 40a). The Commission found that in the particular "ratemaking activities in reaction to Sapphire," but in no other respects, AGAFBO had also violated Section 15 of the Shipping Act (Pet. App. 52a-54a, 60a).

By the time of the Commission's Report, the offending rates had not been in effect for almost two years. For this reason, and because MSTS had adopted a competitive bidding system in late 1966 (Pet. App. 31a, 28a), the Commission issued no order with respect to these rates; and apparently, for the same reasons, the Commission did not differentiate in its Report between those AGAFBO members who established, maintained and used these rates in their shipping contracts with MSTS and those who did not.

These four respondents never served the Bordeaux-Hamburg or United Kingdom trade, never competed with petitioner Sapphire Steamship Lines for the carriage of cargo in that trade, and did not set, file, or use the AGAFBO rates which the FMC Report concluded were in violation of Section 18(b)(5) and Sec-

tion 15 of the Shipping Act. Moreover, the AGAFBO Agreement approved by the FMC specifically precluded members from voting on matters "having application only to a specific region, such as the Bordeaux-Hamburg range" unless they had "a shipping contract or rate agreement with MSTS covering such area," or unless a member serving the trade requested a full membership vote. (FMC Agreement 8086-2, approved July 10, 1962). No such full membership vote was ever requested or taken as to rates applicable to the Bordeaux-Hamburg or United Kingdom range, and consequently, none of these four respondents ever voted on the establishment of the rates which the FMC found to be unlawful.

The only direction resulting from the FMC's Report was that the AGAFBO Agreement be modified to eliminate authorization for various functions made obsolete by MSTS' adoption of competitive bidding procurement (Pet. App. 61a).

Sapphire Steamship Lines, Inc. and two of its officers and stockholders brought suit in the district court to compel the Maritime Administrator to terminate the payment of subsidies to AGAFBO carriers and to recover subsidies paid since March 29, 1965, the date the illegal rates went into effect. The district court dismissed the complaint for lack of standing to sue (Pet. App. 79a-85a). In its first decision in this case on September 26, 1969, the court of appeals held that petitioners had standing to sue to challenge the Maritime Administrator's failure under Section 810 of the Merchant Marine Act of 1936 to make a "considered decision whether to recover the subsidies paid in the past" to subsidized members of AGAFBO (Pet. App. 70a, 79a). It held, further, that the Administrator's

action was reviewable because although he "may have some discretion in connection with the recovery of past subsidies . . . the discretion is not unlimited" (Pet. App. 78a). The Court did not define the scope of the Administrator's discretion, pointing out only that he must consider "the interest of the victim," and that he "was at least required to make a considered decision whether to recover the subsidies paid in the past" and to "give clear indication that [he] has properly exercised the discretion with which Congress had endowed [him]" (Pet. App. 78a-79a).

Promptly after that decision, the Maritime Subsidy Board commenced a proceeding (Docket No. S-243) to determine the appropriate action to be taken, and all subsidized members of AGAFBO, including these four respondents, were named as parties. Petitioners then moved to enjoin any further subsidy payments to the AGAFBO lines and for other relief. The district court denied this motion (Pet. App. 19a-21a). In its decision of February 26, 1970 (Pet. App. 7a-17a) the court of appeals upheld the district court's denial of an injunction against the payment of current subsidies, but went on to hold that in considering whether to recover past subsidies the Maritime Administration should give collateral estoppel effect to the findings of the FMC in Docket No. 65-13, that AGAFBO rates in 1965-1966 on Bordeaux-Hamburg traffic were at an "unreasonably low" level "in an attempt unfairly to compete with Sapphire." (Pet. App. 11a-12a). The court directed that the Maritime Administration was "not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." (Pet. App. 17a).

While this ruling limited the scope of the pending proceeding before the Maritime Administration, Judge Friendly made clear that his decision was not to be taken as requiring the Board to impose Section 810 penalties without a further hearing, and that the Maritime Administration still had to exercise its discretion under Section 810. It had authority to investigate "the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom" (Pet. App. 17a, n. 2).

Petitions to intervene and for rehearing were then filed by all of the subsidized members of AGAFBO. These four "non-trade" respondents, that the effect of the court of appeals decision, despite this qualification, would be to deprive them of a right to a hearing on the fundamental issue of whether Section 810 was in fact violated by AGAFBO's Bordeaux-Hamburg and United Kingdom ratemaking.[3] The court denied rehearing on June 18, 1970, but in so doing expressly reaffirmed its decision that the question of which members of AGAFBO had participated in the illegal action

[3] These "non-trade" Respondents pointed out, *inter alia*, that they had had no incentive to seek court review of the FMC's findings since they were confident that no penalty case under Section 15 of the Shipping Act, 1916, could be made out against them, in view of their non-participation in the illegal conduct charged. This confidence was vindicated when the Justice Department, acting on a referral from FMC, sought and recovered penalties in connection with a pre-litigation settlement *from only the members of AGAFBO who served the United Kingdom and Bordeaux-Hamburg trade*, but neither sought nor recovered any penalties from these non-trade respondents. See Wall Street Journal, March 23, 1970, at 4, col. 3 (E. ed.).

was an open one to be decided by the Maritime Administration in reaching its ultimate decision (Pet. App. 3a). Thereafter, on July 14, 1970, petitioners sought review of the court of appeals decision of February 26, 1970, contending that the Second Circuit erred in leaving any issues to be determined by the Maritime Administration with regard to recovery of past subsidies. They urge that Section 810 is mandatory with respect to recovery of such subsidies, and that the Maritime Administration has "no discretion" to do anything but recover all subsidies paid during a period of violation.

ARGUMENT

This case is in an interlocutory posture clearly not warranting the grant of certiorari. The court of appeals has remanded to the Maritime Administration for the exercise of its discretion under Section 810 of the Merchant Marine Act to determine whether or not to recover subsidies paid to AGAFBO conference members during a period of rate violation and, if so, how much and from whom. Claiming that Section 810 mandates the recovery of all subsidies paid to all conference members, irrespective of their participation in the illegal conduct, petitioners seek to abort the remand and to present directly to this Court issues of statutory interpretation that have never been the subject of considered decision by the agency or the court below, and whose resolution depend upon factual and policy matters still to be determined by the agency. We submit that in these circumstances, the grant of certiorari is clearly not warranted.

1. Insofar as the court below refrained from making any definitive ruling on the scope of the Martitime Administration's discretion under Section 810 and ex-

pressly endorsed the exercise of such discretion, its decision was clearly proper and in line with judicial precedent.

First, the Maritime Administration has been charged by the Congress with implementing Section 810. This is not a case where the courts have jurisdiction independent of the administrative agency and the statute it implements. Under the statute, the decision below, and even the theory of petitioners' complaint, it is obvious that the Administration must act under Section 810 before petitioners can secure any of the remedies they seek. This Court has held, many times, that litigants must exhaust their administrative remedies before turning to the judiciary: *E.g. Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946). The ruling is a sound one aimed at preventing litigants from interrupting an agency's consideration of a matter before it has been completed; excessive and premature recourse to the courts would destroy the administrative process. Here no reason has been advanced for abandoning the requirement of exhaustion of administrative remedies, and indeed there is none.

Second, the Maritime Administration has never construed Section 810's subsidy provision in a case involving recovery of past subsidies. Under settled principles, the Maritime Administration's view of the statute that it implements is entitled to considerable weight.[4] In these circumstances, it is proper to defer judicial resolution of the issue until after initial consideration

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[4] *Power Reactor Dev. Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408 (1961); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933).

by the Administration's "expert and specialized knowledge."[5]

Third, the need for securing the views of the Maritime Administration is especially acute in this case, where, in addition to the factual questions concerning the past activities of individual carriers, there are issues relating to the shipping industry and its competitive condition that should enter into a determination under Section 810. Included among these, are the ability of United States carriers to handle foreign water-borne commerce, the naval and military needs of the United States, and the quality of United States vessels and their crews.

2. Moreover, petitioners are clearly in error in their interpretation of Section 810, and their argument that its "plain language" precludes the exercise of any discretion by the Maritime Administration. As Judge Friendly stated below, Section 810 is mandatory in terms only with regard to payments to current violators (Pet. App. 77a). Noting that Section 810 "does not expressly authorize the Maritime Administrator to recover subsidies improperly paid in the past," Judge Friendly resorted to "common law principles" as a basis for recovery of payments made during a period of past violation (Pet. App. 76a-77a).

Furthermore, the statutory context of Section 810 compels the conclusion that the Maritime Administration has discretion regarding recovery of past subsidies. The Merchant Marine Act of 1936 provides for subsidies for American shipping to meet competitive conditions in the maritime industry and to promote the

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[5] *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 64-66 (1956).

United States foreign commerce, and clearly contemplates the exercise of considerable expertise and discretion by the Administration. Carrying out its responsibility under the Act, the Maritime Administration is called upon to consider the purposes and policies of the Act, which are stated in § 101 thereof, 46 U.S.C. 1101:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

As Judge Friendly clearly recognized, any non-mandatory remedy has to be formulated consistent with the basic purpose of the Act, to develop and maintain the U.S. merchant marine. Thus, after stressing that the "mandatory" provision of Section 810 was applicable only to current violators, Judge Friendly dismissed the suggestion that violators be perpetually barred as "an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the develop-

ment of the American merchant marine" (Pet. App. 77a). Certainly, no such Draconian approach should be adopted, or even considered, without first hearing from the agency in whose hands the well-being of the U.S. civilian fleet has been placed by the Congress.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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